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March 19, 2001

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA HAND DELIVERY**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

**Re:    Comments of The Non-MVPD Owned Programming Networks  
      in CS Docket No. 01-07**

Dear Ms. Salas:

Enclosed for filing please find the original and nine (9) copies of the Comments of The Non-MVPD Owned Programming Networks in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

*Lawrence R. Sidman*

Lawrence R. Sidman

Enclosures

*049*

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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MAR 19 2001

In the Matter of )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Nondiscrimination in the Distribution of )

CS Docket No. 01-07

Interactive Television Services Over Cable )

**COMMENTS OF  
THE NON-MVPD OWNED PROGRAMMING NETWORKS**

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March 19, 2001

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## **Executive Summary**

The Non-MVPD Owned Programming Networks,<sup>1</sup> by their attorneys, submit these Comments in response to the Commission's *Notice of Inquiry*<sup>2</sup> ("ITV NOI") in the above-captioned proceeding. The Internet and television are converging rapidly to form the Interactive Television ("ITV") market. The ITV market exists today and promises to deliver enormous benefits to consumers and the economy. Because ITV is linked inextricably to the television experience shared by all Americans, regardless of where they live or their economic status, it may well prove to be the transforming application that promotes ubiquitous broadband deployment. ITV services also promise to revolutionize commerce and the advertising landscape, permitting the "narrowcasting" or tailoring of advertising to consumers and compressing the time between advertising and the purchasing of products.

Consumers will not reap the full benefits of the ITV market, however, unless vertically integrated broadband distributors with market power are prevented from discriminating against unaffiliated ITV service and content providers, and the intellectual property rights of the underlying video programming networks are safeguarded through application of copyright law and the use of protections such as watermarking or digital rights management methods.<sup>3</sup> The market alone cannot prevent vertically integrated broadband distributors with market power from

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<sup>1</sup> "The Non-MVPD Owned Programming Networks" filing these Comments are: The Walt Disney Company, Viacom, USA Networks, Inc., and Univision Communications Inc. They own some of the most viewed programming in the United States.

<sup>2</sup> *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, *Notice of Inquiry*, FCC 01-15 (rel. Jan. 18, 2001).

<sup>3</sup> *Id.* ¶¶ 9, 14 (observing that "[t]hose without an attributable interest in video programming networks may or may not have contractual agreements with video programming networks to provide associated ITV enhancements") (emphasis added).

acting in their economic self-interest by favoring their own or affiliated ITV services and content. Rather, technologically neutral nondiscrimination safeguards are needed to ensure that consumers can enjoy a diversity of ITV services and content at prices driven lower by competition. Without such safeguards, consumers will have fewer choices and will be forced to pay more for a limited selection of poorer quality ITV services.

At present, vertically integrated cable companies operate the dominant distribution platform for ITV services. That may change in the future as DSL or satellite capability to offer ITV services evolves. But consumer freedom to choose among competing and diverse ITV services cannot be sacrificed while we wait. Moreover, waiting may well foreclose competition in the ITV market. It is far easier and requires far less intrusive government regulation to prevent monopoly power from distorting a relatively new market than it is to combat monopoly power already unleashed in a more developed market.

That is why the Non-MVPD Owned Programming Networks urge the Commission to initiate an NPRM proposing technologically neutral nondiscrimination safeguards that will promote competition and consumer choice in the ITV market. In these Comments, the Non-MVPD Owned Programming Networks outline several approaches that the Commission should consider for that NPRM.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Nondiscrimination in the Distribution of</b>	)	<b>CS Docket No. 01-07</b>
<b>Interactive Television Services Over Cable</b>	)	

**COMMENTS OF  
NON-MVPD OWNED PROGRAMMING NETWORKS**

**I. Introduction**

Today, consumers have access to Internet-related services over a narrowband platform that rides on an open, end-to end, telecommunications architecture. This enables consumers to access any Internet service or content provider they choose. Unfortunately, the slow speeds of the narrowband platform are frustrating the consumer's ability to access the rich, bandwidth-intensive content that increasingly is becoming available. The prospect of ubiquitous deployment of broadband transport infrastructure provides consumers with the opportunity to have a new generation of Internet-based services at speeds not previously imagined.

Interactive Television ("ITV") is one of the most promising of these new services because it is rooted in the television experience so familiar to all Americans, regardless of age, region of the country in which they live, or economic status. As ITV services move from simple, currently available forms such as electronic program guides ("EPGs") to more sophisticated, tailored applications and t-commerce,<sup>4</sup> broadband capacity and speed will become a necessity. The resulting shift from narrowband to broadband transport platforms must not force consumers to sacrifice the freedom of choice among diverse sources of content and services that has been

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<sup>4</sup> The term "t-commerce" means the electronic purchase of goods and services via television.

the hallmark of the Internet. Accordingly, the Non-MVPD Owned Programming Networks<sup>5</sup> respectfully submit that the Commission should create technologically neutral, nondiscrimination safeguards to ensure that vertically integrated broadband distribution providers with market power—whether they are cable, telecommunications, or satellite operators—do not use their control of the broadband platform to degrade or impede access to unaffiliated ITV content and services at the expense of consumer choice.

**II. ITV Services Should be Defined to Include All Services that Transmit, to or from the Viewer's TV, Viewer-Preferred Content or Data that is Directly or Indirectly Associated with the Main Audio or Video Signals (NOI ¶¶ 1, 6-9, 15-17)**

The Non-MVPD Owned Programming Networks believe that “ITV services” should be defined to include all services that transmit, to or from the viewer’s television, viewer-preferred content or data that is directly or indirectly associated with the main audio or video signals. This definition captures the Commission’s correct conclusion that “ITV is a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams.”<sup>6</sup> The definition also reflects the Commission’s recognition that ITV may not always be associated with a specific video signal, and may include features and services such as EPGs, e-mail, instant messaging, games, t-commerce and advertising.<sup>7</sup>

The advertising application is particularly important to broadcasters.<sup>8</sup> To accommodate the expected vibrance of interactive advertising, the Non-MVPD Owned Programming Networks

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<sup>5</sup> This filing is made on behalf of the following Non-MVPD Owned Programming Networks: The Walt Disney Company, Viacom, USA Networks, Inc., and Univision Communications Inc.

<sup>6</sup> *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, *Notice of Inquiry*, FCC 01-15, at ¶ 6 (rel. Jan. 18, 2001) (“ITV NOI”).

<sup>7</sup> *Id.* ¶¶ 6-7.

<sup>8</sup> Forrester Research projects that 75 percent of all television commercials will air with interactive enhancements by the year 2005. See Michael Kokernak, *T-Commerce: An Awakening Giant*, RESPONSETV, Feb. 1, 2001.

believe that the definition of ITV services that the Commission adopts should be slightly expanded to include interactive services (triggered by more methods than just consumer clicks on an ITV icon) that incorporate viewer preference, usage, demographic and transaction data for purposes of customizing ITV content, commerce and advertising to viewers.

**III. An ITV Services Market Exists Today, Is Expected to Expand Rapidly, And Promises to Bring Great Benefits to Consumers and the Economy (NOI ¶¶ 1, 6)**

*A. The ITV Services Market Is Here Now and Should Grow Rapidly*

The convergence of the Internet and television has created—and will continue to create—new products, and thus new markets, for consumers. One such market is ITV, where consumers have the option to augment the largely passive, one-way medium of broadcast video programming with a new and exciting interactive environment that combines the television with the computer. ITV synthesizes the use of the Internet and the television, enabling consumers to use their remote controls to select the video programming, movies and products of their choice whenever they want them.

The early stages of ITV are already here, including interactive electronic program guides, near video-on-demand services, and hardware devices and software programs that enable consumers to engage in e-mail, chat and instant messaging while viewing and interacting with television content and advertising. Industry participants have developed a set of open standards through the Advanced Television Enhancement Forum (“ATVEF”) to make the widest possible variety of content available and to encourage consumer demand. The resulting ATVEF-A and



ATVEF-B standards<sup>9</sup> for ITV content have led certain cable and broadcast networks to start integrating interactivity into some of their programming and advertising.

More than 12 million PC players have logged on to answer Regis Philbin's *Millionaire* queries in a real-time, play-along version that ABC.com introduced on its site in 2000. ABC also has drawn favorable viewer response to its enhanced-TV treatment of *Monday Night Football*, with the January 2000 Super Bowl drawing 650,000 PC users who plugged in for additional statistics and other material during the game. The Public Broadcasting Service will conduct a four-week trial, commencing on March 27, 2001, sending enhanced programming for *Scientific American Frontiers* to viewers in seven markets.<sup>10</sup> The Weather Channel, MTV, CNN, CNBC, NBC, ESPN and others have already deployed many other ITV programs. Wink and WebTV provide consumers with other basic forms of interactive television services.<sup>11</sup> All of these services form the foundation for an expanding ITV services market, which will serve consumers increasingly through a digital broadband platform.

*B. The Potential Economic Benefits of the ITV Services Market Are Significant*

As the next gateway to the American home, ITV will be a catalyst for enormous economic activity. A Forrester Report predicts that interactive advertising will generate \$25 billion in new revenues by 2005, offsetting a projected loss of \$18 billion in traditional advertising.<sup>12</sup> That one statistic demonstrates the potential of ITV services to transform

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<sup>9</sup> An ATVEF-A "trigger" instructs the set-top box to display an icon on the screen that the consumer can click to access interactive content. ATVEF-B data provides the interactive content itself. *See In re Applications of America Online, Inc., and Time Warner Inc. for Transfers of Control*, CS Docket No. 00-30, *Letter to Magalie Roman Salas, FCC Secretary, from The Walt Disney Company*, Attach. at 2 (Sept. 26, 2000).

<sup>10</sup> *See* Ken Kerschbaumer, *PBS Crossing New ITV Frontier*, BROADCASTING & CABLE, Mar. 5, 2001, at 37. In the trial, an icon will flash on the screen, allowing the viewer to press a button on the remote to access an L-shaped pop-up frame containing content related to the video program. *Id.*

<sup>11</sup> Wink and WebTV are beachheads for more advanced, broadband interactive services.

<sup>12</sup> *See* FORRESTER RESEARCH, SMARTER TELEVISION (July 2000).

advertising. For example, RespondTV, a leading infrastructure and service provider for interactive content, and The Weather Channel, cable's leading source for weather information, plan to work together to provide advertisers with an additional medium for reaching television viewers through the unique capabilities of ITV. Their advertisers will add commerce, collect targeted leads and track the effectiveness of an interactive television campaign.<sup>13</sup> For example, Coca-Cola ran an interactive commercial with RespondTV during the holiday season that featured an offer for a free Coca-Cola Polar Bear stuffed animal. Almost 50 percent of the consumers who viewed this advertisement ordered the toy.<sup>14</sup>

A Mercer Management Consulting study revealed that about 55 percent of cable or satellite subscribers were willing to pay additional charges of \$25 per month or more for a full array of enhanced entertainment services.<sup>15</sup> The ITV market is expected to generate revenues of more than \$20 billion by 2005, and more than \$32 billion by 2006.<sup>16</sup> Forrester Research estimates that by 2005, more than 55 percent of homes in the U.S. will have digital set-top boxes,<sup>17</sup> the key for the delivery of ITV in the broadband world. Jupiter/Media Metrix forecasts that by 2005, 40 percent of U.S. households with digital television also will have interactivity.<sup>18</sup>

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<sup>13</sup> RespondTV has demonstrated strong consumer response rates through interactive commercials for national campaigns including American Airlines, Ralston Purina, H&R Block, Coca-Cola and Ford. *See The Weather Channel and RespondTV Partner to Offer Advertisers Interactive Television Advertising*, PR NEWswire, Feb. 28, 2001.

<sup>14</sup> *See* Jim Stroud, *Industry Experts Agree: DBS Future Lies in More Interactivity*, SATELLITE NEWS, Feb. 12, 2001.

<sup>15</sup> *See* Patrick Sansonetti, *Interactive TV: The Market Payoff and Playoffs*, MULTICHANNEL NEWS, Dec. 4, 2000, at 131.

<sup>16</sup> MYERS GROUP, *INTERACTIVE TELEVISION OUTLOOK 2000*, at 13 (June 2000).

<sup>17</sup> *See* Sansonetti, *supra* note 15, at 131.

<sup>18</sup> *See* Kathy A. McDonald, *Advertisers Test Interactive Arena*, VARIETY, Jan. 15-21, 2001, Special Report, Special Supplement, Spotlight: NATPE 2001, at 41.

These benefits will be diminished, however, if consumers are denied meaningful access to a diversity of ITV content and services.

*C. The Internet and Television are Converging, Integrating Advanced ITV Services Through the Digital Set-Top Box*

Television's move from analog to digital technology and the Internet's shift from narrowband to broadband platforms have established the technological foundation for true convergence of television and the Internet. Today, using analog TV receivers and dial-up Internet access through the PC, consumers seeking rudimentary video interactivity with the Internet enjoy almost boundless freedom. They can access almost any content or service they desire, and they can make purchases without encountering nuisance taxes or discriminatory toll booths. However, these first generation ITV services are slow, disjointed, and usually provided on two separate screens. As interactive services become more available through the transition to digital technology and the broadband platform, consumers will have access to advanced ITV services at breathtaking speeds on one screen. ITV will be a critical enhancement to today's video programming. Unless sufficient nondiscrimination safeguards are established, the demand for ITV and the content underlying the enhancement will erode.

The digital set-top box and related devices will be the central artery that controls the flow and distribution of advanced ITV services to the consumer. Vertically integrated, broadband distribution providers that own content and write the specifications for the digital set-top box will have the ability and the economic incentive to impede consumer access to diverse, unaffiliated ITV services and content in a wide variety of ways. These include slanting EPGs to favor their affiliated content, degrading the quality of service of unaffiliated offerings, and charging discriminatory tolls for consumer access.

#### **IV. A National Nondiscrimination Policy is Essential to Ensure Continued and Unfettered Consumer Choice Among Diverse Content Services in the ITV Marketplace (NOI ¶¶ 5, 20)**

In the narrowband world, ITV services ride on a highly regulated, telecommunications network that provides nondiscriminatory access.<sup>19</sup> As Professor Lawrence Lessig points out, “[u]nder the design that gave us the Internet, control is decentralized. The network owner cannot control the content or the applications that run on the network. Users choose from an almost unlimited range of content and applications.”<sup>20</sup> In fact, the secret to the Internet’s prodigious popularity and growth has been the “network effects” that have resulted from this nondiscriminatory, interconnected structure of the narrowband platform.<sup>21</sup>

Ironically, the shift to broadband that holds out the possibility of nearly limitless capacity and faster speed also threatens to end the openness that caused the Internet to thrive in the first place. Operating the broadband conduit for ITV services on a closed, proprietary model, rather than an open, nondiscriminatory model, will retard the growth of ITV services, depress competition and innovation, and force consumers to pay higher prices for fewer choices and

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<sup>19</sup> It is often said that the Internet is free from regulation. In actuality, only the information services remain relatively free from regulation; the telecommunications distribution platform is subject to stringent common carrier regulation. In the context of broadband, however, the Non-MVPD Owned Programming Networks are not advocating application of the “must-carry” aspects of common carriage to ITV, but merely nondiscrimination requirements.

<sup>20</sup> Lawrence Lessig, *Straightjacket on the Internet?*, WASH. POST, Oct. 25, 2000, at A31.

<sup>21</sup> See *AOL/Time Warner Merger: Hearing Before the Subcomm. On Communications, Senate Comm. on Commerce, Science, and Transp.* (March 2, 2000) (statement of Jerry Berman, Executive Director of the Center for Democracy & Technology, and John Morris, Director of the Broadband Access Project) (stating that “[t]he narrowband Internet developed into this dynamic medium in large part because it has been ‘open’ at virtually all levels of its existence”), <http://www.cdt.org/testimony/000302berman.shtml>; Peter S. Goodman, *AT&T Puts Open Access to a Test*, WASH. POST, Nov. 23, 2000, at E1 (quoting John Schwartz, President of Free Speech T.V., which distributes documentaries over the Internet, as stating that “[t]he Internet has flourished because it essentially has no gatekeeper.”).

poorer quality service.<sup>22</sup> Professor Lessig argues that we should not allow aspiring gatekeepers to use the shift to broadband as an excuse to throw out the narrowband framework of nondiscriminatory access:

Rather than extending the model of cable TV to cover the Internet, why not extend the model of the Internet to cover all Internet-active TV? If there was some reason to believe we would get more innovation and more diverse content with the Internet controlled the way cable TV is, then there might be a reason to allow cable to extend its model. But history gives us no such reason. The innovation of the Internet came from freeing the innovators from control by the network owners.<sup>23</sup>

The task, then, is to continue nondiscrimination safeguards in the broadband environment so that the network benefits continue. Rather than allow the shift to broadband to sever the links that have been the lifeblood of the Internet, the Commission should maintain the tradition of nondiscriminatory, end-to-end connectivity, ensuring the ability of consumers to connect to the server of any broadband content or service provider they desire.

A hands-off regulatory approach was sufficient during the development of basic, narrowband Internet services because such services were provided over the telecommunications network, where a historically nondiscriminatory framework was in place. A hands-off approach will no longer work, however, as we shift from the nondiscriminatory, narrowband paradigm to a closed, broadband one. As AOL's George Vradenburg explained before the merger with Time Warner, the FCC's inaction with respect to open access is "slowing the development of the Internet."<sup>24</sup>

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<sup>22</sup> See, e.g., Julia Angwin, *Cable Alliances Prompt Some Consumers to Pay Twice for Web Access*, WALL ST. JOUR., Nov. 20, 2000, at B1 (observing "that the array of Internet options is shrinking—and prices are rising—as the world moves from dial-up Internet connections to the much-vaunted world of high-speed, or broadband, connections").

<sup>23</sup> Lawrence Lessig, *Straightjacket on the Internet?*, WASH. POST, Oct. 25, 2000, p. A31.

<sup>24</sup> Shu Shin Luh, *FCC Weighs Appeal on ISPs, Cable*, WASH. POST, June 15, 1999, at E3.

The Commission has itself pointed out that “[i]t is particularly important to develop a national legal and policy framework in light of recent federal court opinions that have classified cable modem service in varying manners.”<sup>25</sup> To encourage development of high-speed services, the Commission has said that it hopes “to instill a measure of regulatory stability in the market.”<sup>26</sup> To do so, the Commission must continue in the broadband ITV world the policy of nondiscrimination that currently exists for narrowband Internet services. The Commission should not view this as a departure from, but a continuation of, its existing policy of promoting competitive markets, as a nondiscrimination policy does not regulate the market so much as let the market operate freely.

While the FCC may believe [that] inaction simply constitutes its ‘unregulation’ of the Internet, we should be clear that non-intervention constitutes instead a fundamental policy reversal. For thirty years the consistent FCC policy has been to foster competition ... and to promote an open network architecture. Far from non-intervention, this has required sustained policy intervention to keep the US communications infrastructure open.<sup>27</sup>

A number of local municipalities have endeavored to develop policies governing the cable broadband platform. The problem is that tens of thousands of franchising authorities setting their own ITV guidelines will result in uncertainty and increased compliance costs, stifling investment and deployment. As the Commission pointed out in its brief in the *AT&T v. Portland* case, “[t]he FCC is the only agency with jurisdiction over all the current providers of broadband technology—cable operators, wireline telephone companies, providers of wireless

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<sup>25</sup> *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185, *Notice of Inquiry*, 15 FCC Rcd. 19287, at ¶ 2 (2000) (“Cable Open Access NOI”) (comparing *AT&T Corporation v. City of Portland*, 216 F.3d 871 (9<sup>th</sup> Cir. 2000) to *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11<sup>th</sup> Cir. 2000) and *MediaOne Group Inc. v. County of Henrico*, 97 F.Supp.2d 712 (E.D. Va. 2000), *appeal docketed*, No. 00-1680 (4<sup>th</sup> Cir.).

<sup>26</sup> *Id.* ¶¶ 2-3, 32 (emphasis added).

<sup>27</sup> François Bar et al., *Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm*, E-CONOMY WORKING PAPER 12, at 3, Berkeley Roundtable on the International Economy, August 1999, <http://e-conomy.berkeley.edu/publications/wp/ewp12.pdf>.

telecommunications services, and satellite communications firms. Local franchising authorities, in contrast, are in no position to implement technologically neutral policies with respect to all these competitors.”<sup>28</sup> Consequently, the only way to bring stability to the ITV market is for the FCC to set national policy.

It is not too early in the evolution of the ITV market for such safeguards, but precisely the right time. Nondiscrimination safeguards will create a virtuous circle: lowered entry barriers will allow more firms to compete to provide ITV services and content, resulting in innovative services and lowered prices, in turn spurring consumer demand for ITV services and the broadband capacity to enjoy those services. This will prompt additional deployment, resulting in an increased number of service and content providers, further compounding competition and starting the cycle anew.

Claims that nondiscrimination safeguards will retard broadband deployment are unavailing. Technologically neutral safeguards will *promote* investment in broadband infrastructure as well as ITV services and content. With greater certainty and assurances of nondiscrimination in the ITV market, entrants will invest in broadband to capture new revenue streams. Existing firms will invest in broadband to avoid losing market share to the new entrants. Furthermore, existing firms will continue to invest in broadband infrastructure to provide cable-modem, digital-cable, pay-per-view, and video-on-demand services. Moreover, the availability of content and services is critical to the development of new markets: If unaffiliated content and service providers have no incentives to create products, the broadband transmission pipes will be useless.

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<sup>28</sup> Brief of the Federal Communications Commission as Amicus Curiae at 29, *Portland*, 216 F.3d 871 (9<sup>th</sup> Cir. 2000) (No. 99-35609).

**V. The NOI's Predicate for Regulation Is Present: The Market Cannot Ensure that Consumers Have Nondiscriminatory Access to ITV Content and Providers (NOI ¶¶ 1-4, 21-24, 37-38)**

*A. Vertically Integrated Broadband Distribution Providers Have the Incentive to Use their Market Power to Discriminate in the Distribution of ITV Services*

Vertically integrated broadband distribution providers with market power—whether they are cable, telecommunications, or satellite operators—will have enormous economic incentives to favor their own or affiliated ITV content and services. The payoff for dominating the ITV market—potentially worth hundreds of billions of dollars—will be far too tempting for vertically integrated ITV distributors to resist discriminating against unaffiliated ITV service and content providers, thereby resulting in limited consumer choice.

The Commission is wise to consider the highly instructive anticompetitive behavior of vertically integrated entities in other markets to assess how best to protect consumer choice and ensure nondiscrimination in the burgeoning ITV market. For example, Congress found extensive problems in the MVPD market in the late 1980s and early 1990s, where vertically integrated cable operators used their market power to refuse carriage of unaffiliated content and to deny competing MVPDs valuable programming.<sup>29</sup> These abuses caused Congress to enact Sections 616 and 628 of the Communications Act to guard against discrimination. In the Telecommunications Act of 1996, Congress sought to prevent Open Video Services providers from favoring affiliated content in electronic program guides and other navigational devices by enacting Section 653 of the Communications Act.

The potential for such discrimination and consequent denial of consumer choice is even greater in the broadband environment, and the ITV market in particular, because the economic

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<sup>29</sup> See *ITV NOI* at ¶ 21.



stakes are potentially higher and the market power problem may be more pronounced. In the absence of nondiscrimination safeguards, a panoply of anticompetitive practices is likely to occur.

*B. Complete Reliance on Self-Distribution is Unrealistic and Undesirable*

Opponents of enforceable nondiscrimination safeguards and unfettered consumer choice in the ITV market might suggest that each content provider in the ITV market purchase its own ITV distribution facility. Relying on self-distribution in the emerging ITV market is unwise for several reasons. First, the opportunities to purchase broadband distribution facilities with national reach are limited, and shrinking quickly as the market continues to consolidate. Second, a policy requiring every ITV content provider to purchase its own distribution facility would limit the growth of the ITV market dramatically and diminish content diversity for consumers. Third, building or acquiring a truly competitive ITV distribution facility is capital intensive, and presents a tremendous barrier to entry, even for large companies. Congress and the Commission recognized the entry barriers that capital investment in distribution facilities presents when they created interconnection, unbundling, and resale obligations to promote competition for local voice telephone service.

*C. Pledges to Provide Nondiscriminatory Access Are Insufficient*

There is no sound basis for believing that vertically integrated broadband distribution providers with market power will voluntarily refrain from discriminatory practices and skewing consumer choice. The experience borne from the AOL/Time Warner merger review and the fight over “open access” for unaffiliated ISPs should be very instructive to the Commission as it examines the ITV market. The AOL/Time Warner merger review showed that a vertically integrated broadband distributor is reluctant to give consumers unfettered access to unaffiliated

services except when it fears the Federal Government might otherwise intervene.<sup>30</sup> The lessons learned from the AOL/Time Warner merger are applicable to the ITV market. Market forces alone are insufficient to ensure consumer choice and nondiscrimination in the ITV market.

**VI. Currently, Vertically Integrated Cable Operators Have Market Power As the Dominant ITV Services Distributors (NOI ¶¶ 1-4, 18-22, 37).**

The Non-MVPD Owned Programming Networks agree with the Commission that, as with MVPD services, vertically integrated cable operators currently have market power in the distribution of ITV services.<sup>31</sup>

*A. The Cable Platform is Well-Suited to the Provision of ITV*

Cable holds a number of marketing, technological, and economic advantages over rival distributors of broadband services that enable it to dominate the emerging ITV market at this time. As the dominant distribution vehicle for basic television service, cable has a tremendous head start over its competitors in the business of providing interactive television services. Cable operators claimed 67.7 million subscribers as of June 30, 2000, with the percentage of TV households subscribing to cable rising 1.5 percent from the prior year to 67.4 percent.<sup>32</sup> These cable subscribers represented 80 percent of all MVPD households and 67.4 percent of all television households.<sup>33</sup> By that date, cable facilities passed 96.6 percent of TV households.<sup>34</sup> In

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<sup>30</sup> See *Time Warner Reaches Out to EarthLink*, WALL ST. JOUR, Nov. 21, 2000, at A3 (stating that “Time Warner signed the deal under enormous pressure from the Federal Trade Commission, whose review of the pending AOL-Time Warner combination focused heavily on how easily Time Warner would open its cable system to rival Internet services”).

<sup>31</sup> *ITV NOI* at ¶ 22.

<sup>32</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Deliver of Video Programming*, CS Docket No. 00-132, *Seventh Annual Report*, FCC 01-1, at ¶¶ 5-7, 18, & Tbl. B-1 (rel. Jan. 8, 2001).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

addition, in the year 2000, more than one-third of all satellite-delivered national programming networks were vertically integrated with one or more of the top five cable MSOs.<sup>35</sup>

Cable has the advantage of being able to use this enormous national footprint and its economies of scale to bundle and market a variety of ITV services, giving it the penetration and pricing advantages it needs to secure ITV market domination. Furthermore, cable has the built-in advantage of being able to offer ITV through its broadband facility and set-top box as merely an “upgrade” to existing services, rather than requiring the consumer to purchase costly new equipment.

Cable also has significant technological advantages, such as high upstream and downstream bandwidth capacity and speed, which are critically important to meeting consumer demand for ITV services.<sup>36</sup> Such technological advantages allow cable to deliver rich multimedia content, including voice and video, in a bundled package through connections to the set-top box. In this way, cable easily delivers one of the most important ingredients of ITV, synchronicity, through its ability to simultaneously deliver a variety of interactive services and a return path through one digital pipeline.

*B. The Cable Platform Currently Has No Adequate Market Substitutes*

There are currently no comparable market substitutes to cable in the provision of ITV services.<sup>37</sup> Broadband cable, also known as hybrid fiber coax (“HFC”), is the only distribution

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<sup>35</sup> *Id.* ¶¶ 173-174.

<sup>36</sup> See BEAR STEARNS & CO., *Cable TV & Broadband 20* (Apr. 2000) (“Bear Stearns Report”).

<sup>37</sup> Ironically, the only possible competitive threat to cable in the ITV market comes from cable itself, in the form of cable overbuilders. While some overbuilds have received financing, their future as viable competitive alternatives remains uncertain, and in most cases, they are many years away from having any widespread competitive impact. By the time cable overbuilders complete their systems, any disciplining effect they would have had on incumbent cable operators probably will be greatly diminished or extinguished since they likely will be denied access to the dominant ITV content offerings of vertically-integrated cable operators.

platform capable of delivering the full ITV experience to consumers in a cost-effective manner.<sup>38</sup>

Other technologies such as DSL, DBS, MMDS, fixed wireless, and hybrid systems face serious challenges compared to the ITV capabilities of cable, and they currently cannot meet the needs of consumers or ITV content providers.

- **DSL.** Digital subscriber line (“DSL”) service has insufficient upstream and downstream bandwidth, communication lags, and is only available in relatively close proximity to phone company central offices. Many providers of DSL service are unprofitable, are experiencing problems meeting customer demand, and are having difficulty with the reliable delivery of high-speed Internet service.
- **DBS.** Digital broadcast satellite (“DBS”) service also suffers a communications lag, has limited consumer reach, and insufficient capacity, especially for the return path. In the future, DBS may be capable of providing two-way links, but such service likely will not be cost competitive for the average consumer for years. In addition, satellite is inherently a point-to-multipoint distribution system and is incapable of matching the interactive point-to-point capability of a distributed wireline system such as cable. Even if DBS were initially successful in ITV, there is a potential for many subscribers to quickly saturate DBS’s fixed return path capacity. Increasing capacity can be a costly proposition, involving launching additional satellites, whereas a cable MSO can increase capacity by adding more routers or turning on dark fiber circuits.
- **MMDS.** Multichannel multipoint distribution systems (“MMDS”) started as a video platform years ago, but failed to compete successfully with cable because of limited channel capacity and line-of-sight issues. Sprint and WorldCom have recently acquired most of the MMDS spectrum with the hope of repositioning the technology as a high-speed data and voice platform, a strong indication that MMDS’s potential as an ITV platform is in question.
- **Fixed wireless.** Fixed wireless networks are an adequate telephony solution, and may be suitable for data transmission, but are simply not a threat to cable in the ITV market because they lack sufficient bandwidth to carry video content.
- **Hybrid systems.** Hybrid systems that involve separate Internet and video sources are unreliable for ITV services because of the difficulty of synchronizing downstream ITV data with video programming. For example, DSL speed varies depending upon the number of DSL users seeking Internet access. By contrast, ITV content delivered via cable will not degrade with additional users because the ITV data can be *embedded* in the video stream, thereby rendering it immune to such loading problems. In addition, hybrid systems will be more expensive for ITV consumers than cable because they will necessitate the purchase of multiple services and equipment.

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<sup>38</sup> See *Bear Stearns Report* at 126 (stating that “[o]f all of today’s alternatives, the HFC [cable] plant provides the best platform for the development of . . . consumer based multimedia”).

**VII. The Commission Must Create Nondiscrimination Safeguards So That Consumers Are Not Denied Access to the ITV Providers and Content of their Choice**

*A. Nondiscrimination Safeguards (NOI ¶¶ 1-4, 10-13, 21-38)*

For the ITV market to reach its potential, consumers must be free to select the service and content provider of their choice. Thus, the Commission should prevent broadband distribution providers with market power—whether they are cable, telecommunications or satellite operators—from using their control over the ITV platform to discriminate against unaffiliated services and content.<sup>39</sup> As the Commission suggests, such operators should “be required to provide the same features and functions to unaffiliated ITV service providers as they do to affiliated ITV service providers, and on the same terms and conditions.”<sup>40</sup> The Non-MVPD Owned Programming Networks agree with the Commission, however, that broadband distributors should not be required to enable features and functions that they do not enable for their affiliated companies.<sup>41</sup> The principle should be one of nondiscrimination, not must-carry.

A broadband distribution provider also should not be allowed to abuse its market power to extract concessions that handicap either the negotiating ITV provider, or unaffiliated third parties. For example, vertically integrated broadband distributors should not be allowed to use screen bias to promote affiliated content more prominently. Nor should they be allowed to exact tolls, such as payment to the affiliated connectivity provider for access to the unaffiliated

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<sup>39</sup> See *ITV NOI*, at ¶ 24 (asking whether the Commission should prohibit delivery platform operators from discriminating between affiliated and unaffiliated ITV service providers).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

connectivity provider or unaffiliated content.<sup>42</sup> Currently, a consumer watching *The Drew Carey Show* can surf the Internet to purchase a *Drew Carey* sweatshirt from an ABC web site without any interdiction by the distributor, monetary or otherwise. Why should that change just because the consumer conducts the transaction by clicking on an ABC-provided ITV icon? If the distributor already allows interactivity for affiliated service and content providers, it should provide the same interactivity for ABC.<sup>43</sup>

The Commission asks whether it could endorse “some sort of ‘national best practices’ criterion.”<sup>44</sup> A national best-practices criterion would be a good starting point, but will be hard to craft and difficult to enforce. The Commission should go further by creating nondiscriminatory quality of service (“QOS”) requirements that apply throughout the ITV distribution platform, including the three “building blocks” identified in the NOI: 1) the video stream; 2) the two-way connection; and 3) the customer premises equipment, such as the set-top box.<sup>45</sup>

#### 1. The Video Stream (NOI ¶¶ 10-11, 26-30)

Protecting the video stream, including both upstream and downstream data, will be critical to the ITV experience. As programming providers increasingly integrate interactive enhancements into their video signals, vertically integrated broadband distributors that carry the

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<sup>42</sup> See Angwin, *supra* note 22, at B1, B4 (reporting that cable systems force their subscribers to pay \$40 to affiliated ISPs, in addition to the \$10 to \$20 the subscribers pay to the unaffiliated ISP they actually choose to subscribe to, even though the subscribers do not use the affiliated ISP for e-mail, Internet browsing, or any other services). See also Luh, *supra* note 24, at E3 (quoting George Vradenburg, AOL senior vice president for global and strategic policy, as stating that “[i]n the cable world, consumers don’t have a choice. Consumers have to pay twice’ to connect to an ISP other than At Home”).

<sup>43</sup> The cost to a distributor for providing nondiscriminatory, return-path connectivity would be minimal. Furthermore, this nondiscrimination rule would replicate that *status quo* in the Internet environment, where ISPs ordinarily refrain from charging consumers fees that relate to the uploaded or downloaded data of particular content. Instead, ISPs average these cost and pass them along to all subscribers as part of the fee for service. Similarly, the broadband services distributor should recover its ITV return-path costs in the flat subscription fee.

<sup>44</sup> *ITV NOI* at ¶ 26.

<sup>45</sup> *Id.* ¶¶ 10, 12, 13.

unaffiliated programmer's signal—either through a must-carry obligation or a retransmission consent agreement—will be in a unique position to discriminate against unaffiliated service and content providers by selectively stripping, degrading, impeding access or navigation to, or disabling interactivity. Thus, when a broadband distributor permits ITV data integrated into a video signal to flow over its platform for affiliated providers, it also must permit such interactive data to flow for unaffiliated ITV services and content providers.

For example, if a vertically integrated broadband services distributor allows its customers to participate in an interactive poll on CNN, it should also allow customers to participate in interactive polls provided by ABC. Similarly, if a vertically integrated broadband services distributor carries an interactive advertisement for one network asking if the consumer wants to test-drive an automobile, it should allow it to work for all networks. Indeed, allowing discrimination in this area could shut unaffiliated ITV providers out of interactive advertising altogether.

Stripping, degrading, impeding access or navigation to, or disabling interactive data and content from the video stream will force consumers to download interactive content from the Web via an ISP, slowing data delivery, requiring the use of multiple screens, and disrupting synchronization of data with video. Consequently, in the provision of the video signal, as well as ITV enhancements directly and not directly related to provision of the specific video signal, the Commission must prevent:

- discriminatory stripping or degradation of the ATVEF-A triggers that enable retrieval of ITV content; and
- discriminatory stripping or degradation of non-trigger, ATVEF-B data—such as for auxiliary video and audio programming, frame synchronized graphics, or advertisements—through tactics such as limitations on bandwidth.

## 2. The Two-Way Connection (NOI ¶¶ 12, 32-34)

The current Internet model that allows ISP customers to reach any Internet site anywhere should prevail in the ITV market so the consumer can connect to the server of any ITV service or content provider, including sites associated with video content. The Non-MVPD Owned Programming Networks also believe, as the Commission suggests, that broadband distribution providers should not be permitted to degrade the high-speed Internet connection for unaffiliated ITV service providers.<sup>46</sup> As the Commission points out, such a requirement would be analogous to the requirement that a cable operator not materially degrade a broadcast station's video signal.<sup>47</sup> Thus, the Commission must prohibit:

- discriminatory use of the IP router, which controls all traffic to and from the subscriber down to the packet level, and thereby ensure comparable upstream and downstream bandwidth, with a minimum of 56K for the return path (enabling the same capacity and quality of service for affiliated and non-affiliated ITV content and services), as well as unrestricted flow of all upstream and downstream data types; and
- discriminatory use of the caches that improve delivery speed of interactive content.

## 3. The Customer Premises Equipment (NOI ¶¶ 13-14, 35-36)

The entity that controls the design and architecture of the set-top box can shape the terms under which all information flows through the facility. Consumers should not be required to purchase an additional set-top box to access unaffiliated ITV service and content providers. Nor should unaffiliated ITV service and content providers be expected to absorb the substantial cost of providing and maintaining alternative devices.<sup>48</sup> Nondiscrimination safeguards must extend through the set-top box to allow connections between the video channels being carried and

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<sup>46</sup> See *id.* ¶ 34.

<sup>47</sup> See *id.* ¶ 34 n.25 (citing 47 U.S.C. § 534(b)(4)(A)).

<sup>48</sup> As the Commission is likely to learn in its navigation devices proceeding, there are economies of scale when it comes to deployment of navigation devices that few companies other than broadband distribution providers are in a position to realize. See *In re Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80, *Further Notice of Proposed Rule Making and Declaratory Ruling*, FCC 00-341 (rel. Sept. 18, 2000).



unaffiliated providers of ITV functionality. Thus, the Commission must prohibit:

- discriminatory degradation of audio, video, and graphics through set-top box software, such as programs that provide applications, middleware, rendering and display functionality, and operating systems;
- discriminatory use by the set-top box of proprietary, non-interoperable standards, formats, data types and features, such as instant messaging, that would require subscribers to arrange for installation of a separate set-top box to use unaffiliated services;
- discriminatory use of conditional access hardware and software that can selectively control the flow of data to and from the customer premises equipment or disable intellectual property protection features;
- discriminatory use of the remote control/navigation interface, which can favor or disfavor access to a content provider's programming, program guides, search engines, browsers, and promotional vehicles; and
- discriminatory use of set-top box storage capacity, which can make affiliated content readily available to consumers while slowing down the retrieval of unaffiliated content.

*B. Application and Enforcement of the Safeguards* (NOI ¶¶ 1-5, 21-24, 31, 39-42)

These safeguards should serve as a floor for negotiated relationships that vertically integrated broadband distribution providers with market power enter into with video programming networks, ITV service providers, ITV content providers or set-top box providers. The nondiscrimination safeguards should apply to those broadband distribution providers with market power—regardless of technology—that decide to make ITV available to their customers,<sup>49</sup> either directly through a vertically integrated ITV service or content provider, or through an affiliated provider.<sup>50</sup> As the Commission points out, “[i]f it turns out that only one delivery platform in each geographic area has the capability to provide the most attractive ITV

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<sup>49</sup> Thus, the Non-MVPD Owned Programming Networks are not advocating some type of ITV must-carry obligation. *Accord ITV NOI* at ¶ 21 (“envision[ing] that any nondiscrimination rule would not be triggered unless a cable operator chose to offer ITV services directly or through an affiliate”).

<sup>50</sup> In the case of cable, the Commission's attribution rules, largely upheld by the D.C. Circuit, are one way of determining the extent to which an operator is vertically integrated. *See Time Warner v. FCC*, 94-1035, Slip. Op. at 15-19 (D.C. Cir. March 2, 2001).

services package, and if the platform provider is vertically integrated with an ITV service provider, then there would be the potential for anticompetitive behavior.”<sup>51</sup>

Currently, cable is the dominant platform for delivering ITV services, as the Non-MVPD Owned Programming Networks explain above. And as the Commission points out, Congress has already determined that cable television’s market power as the dominant multichannel video programming distributor necessitates regulatory intervention in cases of vertical integration.<sup>52</sup> Where there is market power in ITV services distribution, nondiscrimination safeguards must apply.<sup>53</sup> In determining market power, the Commission should consider that the market for content is predominantly national while the market for distribution is local. Therefore, the Commission should adopt an approach sufficiently flexible to address the hybrid nature of market power in the ITV services marketplace. Any rules adopted by the Commission to address market power abuse should be technologically neutral.

Parties that initiate negotiations after ITV discrimination rules are in place should be allowed to enforce the safeguards as part of a private agreement subject to arbitration and judicial review.<sup>54</sup> Third parties not involved in negotiations, but affected by conditions of the agreement, should be permitted to challenge, through the Commission’s complaint procedures, conduct that runs afoul of the nondiscrimination safeguards.

### *C. The FCC Has Authority (NOI ¶¶ 5, 25, 43-52)*

The Commission has acknowledged its jurisdiction over all interstate communications

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<sup>51</sup> *ITV NOI* ¶ 1.

<sup>52</sup> *See id.* ¶ 2.

<sup>53</sup> *See id.* ¶ 4 (exploring the idea that those distributors with market power to act anticompetitively with respect to ITV service delivery should be subject to nondiscriminatory safeguards).

<sup>54</sup> However, the Non-MVPD Owned Programming Networks believe the Commission should grandfather existing contracts. *See id.* ¶ 31.

services, including the high-speed services offered by cable, wireline, wireless, satellite, broadcast, and unlicensed spectrum providers.<sup>55</sup> Thus, the Commission can draw on a number of titles and sections in the Act to develop an ITV nondiscrimination framework.

One option might be for the Commission to take a *Computer Inquiries* type approach<sup>56</sup> that treats the ITV broadband platform as telecommunications under Title II, and ITV service and content as information services. This would be consistent with the *Portland* decision, in which the U.S. Court of Appeals for the Ninth Circuit held that @Home is providing a telecommunications service when it uses its broadband cable facility as a “pipeline” to offer subscribers Internet services.<sup>57</sup> Under such an analysis, the Commission could craft ITV-specific safeguards analogous to those currently in place under sections 201, 202, and 251 on just, reasonable, and nondiscriminatory interconnection; section 252 on negotiation and arbitration; section 256 on compatible interconnectivity; and section 257 on eliminating entry barriers and promoting diversity.<sup>58</sup>

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<sup>55</sup> See *Cable Open Access NOI*, at ¶ 3 & nn.4-5 (citing 47 U.S.C. § 151; 47 U.S.C. § 521 *et seq.*; 47 U.S.C. § 201 *et seq.*; 47 U.S.C. § 332; 47 C.F.R. § 15.301 *et seq.*; 47 C.F.R. § 15.401 *et seq.*; *In re Inquiry Concerning the Deployment of Advanced Telecommunications*, CC Docket No. 98-146, *Second Report*, FCC 00-290, at ¶ 55 (rel. Aug. 21, 2000 (Second 706 Report)). See also *Cable Open Access NOI*, at ¶ 13 (stating that “the United States Court of Appeals for the Ninth Circuit [has] confirmed [the] Commission’s role in establishing a national broadband policy”) (citing *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9<sup>th</sup> Cir. 2000)).

<sup>56</sup> See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, *Notice of Inquiry*, 7 FCC.2d 11 (1966) (Computer I); Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), Docket No. 20828, *Final Decision*, 77 FCC.2d 384 (1980) (Computer II); Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, *Report and Order*, 104 FCC.2d 958 (1986) (Computer III).

<sup>57</sup> See *Portland*, 216 F.3d at 877-78. Although the U.S. District Court for the Eastern District of Virginia concluded that MediaOne’s Road Runner ISP was a cable service, it, too, implied that the provision of broadband services over cable could constitute telecommunications when it ruled that Henrico County impermissibly required MediaOne to provide telecommunications facilities by requiring MediaOne to provide transmission between points selected by an ISP and its customer. See *MediaOne Group Inc. v. County of Henrico*, 97 F.Supp.2d 712, 714 (E.D. Va. 2000) (citing 47 U.S.C. § 541(b)(3)(D)), *appeal docketed*, No. 00-1680 (4<sup>th</sup> Cir.). Because the FCC is not a franchising authority, it is not bound by 47 U.S.C. § 541(b)(3)(D).

<sup>58</sup> See 47 U.S.C. §§ 201, 202, 251, 252, 256, 257.

The definition of advanced telecommunications capability bolsters the view that the ITV broadband platform can be treated as telecommunications. “‘Advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications using any technology.”<sup>59</sup> Because the ITV broadband platform can provide such capability, it would appear to be an advanced telecommunication capability, which is presumably a subset of all telecommunications.<sup>60</sup>

However, the Non-MVPD Owned Programming Networks do not advocate treating ITV broadband platform providers as common carriers. Rather, the Commission could use its authority over the provision of telecommunications to apply ITV nondiscrimination requirements to those platform providers that choose to make ITV services available to their consumers.<sup>61</sup> This approach would allow the Commission to forbear under Section 10 from applying any regulations not necessary to prevent discrimination in the ITV context, as well as to forbear from applying the nondiscrimination requirements to carriers and technologies for which there is no threat of market power abuse. Forbearance would not currently be appropriate for large, vertically integrated cable operators because the forbearance criteria cannot be met in light of the

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<sup>59</sup> 47 U.S.C. § 157nt (c)(1) (emphasis added).

<sup>60</sup> The Non-MVPD Owned Programming Networks note that the Commission has so far declined to reach this question as it applies to cable modems, stating that its “inclusion of cable modem technology in [its] assessment of advanced telecommunications capability does not implicate any determination by [the] Commission as to whether cable services constitute telecommunications services.” *Second 706 Report*, at ¶ 29 n.36. Thus, the matter is still open, and the Commission could now conclude that the ITV set-top box platform constitutes telecommunications, although it need not be treated as a common carrier.

<sup>61</sup> *Accord ITV NOI* at ¶ 21 (“envision[ing] that any nondiscrimination rule would not be triggered unless a cable operator chose to offer ITV services directly or through an affiliate”).

inadequacy of market forces to ensure nondiscriminatory access, as we discuss above.<sup>62</sup> Section 10 forbearance authority would not be available at all, however, should the Commission conclude that the ITV platform is something other than telecommunications.<sup>63</sup>

Alternatively, the Commission could independently invoke its existing authority over cable, broadcast, wireline, wireless, and satellite providers, where necessary, to require each to provide nondiscriminatory access when they make ITV available over their specific platforms. For example, with respect to ITV delivered over cable, the Commission might invoke Title VI. ITV arguably falls within Title VI in light of the definition of “cable service” as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”<sup>64</sup> The Commission could find that ITV enhancements constitute subscriber interaction required for the selection or use of video or other programming under paragraph (B). As the Commission points out, support for this view can be

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<sup>62</sup> The Non-MVPD Owned Programming Networks note that Section 706 of the Telecommunications Act of 1996 directs the Commission to *consider* forbearance as one possible means of encouraging deployment of advanced services. See 47 U.S.C. § 157nt. The Commission has made clear, however, that Section 706 does not create independent forbearance authority, but allows the Commission to apply the Section 10 forbearance criteria to advanced services. See *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24011, 24044-48 ¶¶ 69-77 (1998), *Fourth Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 3089, 3106-07 ¶ 34 (2000), *Order on Reconsideration*, FCC 00-293, at ¶¶ 6-9 (rel. Aug. 4, 2000). Thus, Section 706 is no more availing than Section 10.

<sup>63</sup> See 47 U.S.C. § 160(a) (providing forbearance criteria and authorizing the Commission to “forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service”) (emphasis added).

<sup>64</sup> 47 U.S.C. § 522(6).

found in the legislative history to Section 602, which suggests that “or use” was added to the definition of cable in the 1996 Telecommunications Act to include ITV.<sup>65</sup>

As the Commission also points out, such an approach would be consistent with the *Henrico* ruling “that a high speed interactive cable modem service—which includes among other things broadband connectivity between a cable operator and a subscriber, access to the Internet, interactive content and programming, menus, navigational aids and access to newsgroups—falls under the statutory definition of “cable service.”<sup>66</sup> Nor is this inconsistent with the *Gulf Power* decision, which ruled that the “other programming” and “or use” language does not place cable Internet service completely unrelated to video programming within the definition of cable.<sup>67</sup> The court did not rule that interactive video programming falls outside the confines of the cable definition. In fact, the court stated that “[t]he statute’s plain language and Congress’ one sentence explanation suggest that Congress expanded the definition to include services that cable television companies offer to their customers to allow them to interact with traditional video programming.”<sup>68</sup> For similar reasons, such an interpretation is not inconsistent with the *Portland* decision, which ruled that “a non-broadcast interactive medium such as the Internet” is not a cable service; *Portland* did not address ITV.<sup>69</sup>

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<sup>65</sup> *ITV NOI*, at ¶ 45. The Commission cites a Senate conference report which states that “[t]he conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.” S. Conf. Rep. No. 104-230, at 169 (emphasis added). See also H. Rep. No. 104-204, at 97, 106-107 (stating that “[t]his section also makes a conforming change to section 602 ... to add ‘or use’ to the definition of ‘cable service,’ reflecting the evolution of video programming toward interactive services”).

<sup>66</sup> *ITV NOI* at ¶ 45 n.31 (citing *MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712, 715 (E.D.Va. 2000), *appeal docketed*, No. 00-1680 (4<sup>th</sup> Cir.)).

<sup>67</sup> See *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276-77 (11<sup>th</sup> Cir. 2000).

<sup>68</sup> See *id.*, 208 F.3d at 1277.

<sup>69</sup> *AT&T Corporation v. City of Portland*, 216 F.3d 871, 876-77 (9<sup>th</sup> Cir. 2000).

Under Title VI, the Commission could invoke provisions such as section 613 on ownership restrictions, section 616 on carriage agreements, and section 653 on Open Video Systems to create a framework requiring vertically integrated cable providers to allow customers nondiscriminatory access to unaffiliated ITV service and content through the set-top box.<sup>70</sup> Although many aspects of cable service are regulated at the local level, it would be within the Commission's authority to preempt such local regulation, when necessary, as it applies to the set-top box platform.<sup>71</sup>

*D. Nondiscrimination Safeguards Would Be Constitutional Under Turner Broadcasting* (NOI ¶¶ 43, 53)

The Non-MVPD Owned Programming Networks are aware of the recent *Broward* decision by the U.S. District Court for the Southern District of Florida, which held that Broward County's open access ordinance violated the First Amendment.<sup>72</sup> Unlike Broward County, the Commission would be implementing a Congressional mandate under some combination of Titles I, II, and VI and Section 706, and thus would be entitled to more deference.<sup>73</sup> Furthermore, it would not be imposing must-carry rules, but nondiscrimination requirements.<sup>74</sup> Moreover, to the

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<sup>70</sup> See 47 U.S.C. §§ 533, 536, 573.

<sup>71</sup> See Brief of the Federal Communications Commission as Amicus Curiae at 28, *Portland*, 216 F.3d 871 (9<sup>th</sup> Cir. 2000) (No. 99-35609). The Non-MVPD Owned Programming Networks envision such a need in the context of discriminatory access, but not for matters such as basic rates, except where the cable provider uses the rates as a means of discrimination.

<sup>72</sup> *Comcast Cablevision v. Broward County*, No. 99-6934-Civ-Middlebrooks, slip op. at 2 (S.D. Fla. Nov. 8, 2000).

<sup>73</sup> See *Turner Broadcasting Sys. Inc. v. FCC*, 512 U.S. 622, 666 (1994) (stating that "the courts must accord substantial deference to the predictive judgments of Congress"); *Portland*, 216 F.3d at 876 (noting in its consideration of the Portland cable franchise authority's open access requirement that it was "not presented with a case involving potential deference to an administrative agency's statutory construction"). The Non-MVPD Owned Programming Networks note also that the Commission could avoid the concerns of the *Broward* court by applying a telecommunications analysis under Titles I and II, rather than a cable analysis under Title VI, without full common carrier treatment.

<sup>74</sup> See *ITV NOI* at ¶ 21 ("envision[ing] that any nondiscrimination rule would not be triggered unless a cable operator chose to offer ITV services directly or through an affiliate").

extent the *Broward* court relied on the premise that to regulate conduit is to regulate content,<sup>75</sup> the Non-MVPD Owned Programming Networks believe the court overstated the relationship and applied the wrong constitutional standard.<sup>76</sup> As the Commission has concluded in its *Computer Inquiries* line of decisions, the transmission mechanism can be separated from the transmission.<sup>77</sup> Nondiscrimination requirements boil down to content-neutral, economic regulations designed to preserve broadband access to ITV.<sup>78</sup> Consequently, the Non-MVPD Owned Programming Networks believe the Supreme Court's decision in *Turner Broadcasting Sys. Inc. v. FCC* governs.<sup>79</sup>

Under such analysis, nondiscrimination requirements survive the applicable intermediate scrutiny test.<sup>80</sup> Clearly, there is a substantial governmental interest—expressed in provisions of the Act such as Section 706—to promote a multiplicity of channels for expression, fair competition, consumer choice, and the growth of broadband services.<sup>81</sup> Extending the nondiscrimination requirement only to those ITV distribution platforms with market power would also appropriately tailor the requirement.<sup>82</sup>

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<sup>75</sup> *Broward*, at 11-14.

<sup>76</sup> *Accord In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Consumers Union Comments at ii, 6-9 (filed Dec. 1, 2000).

<sup>77</sup> *See supra* note 56 and accompanying text.

<sup>78</sup> *See Turner Broadcasting Sys. Inc. v. FCC*, 512 U.S. 622, 642-52 (1994) (laying out criteria for determining whether a provision is content neutral and applying them to the cable must-carry rules).

<sup>79</sup> *See id.* For that reason, the Non-MVPD Owned Programming Networks find the *Broward* court's compelled speech analysis inapplicable. *See Broward*, at 17-18, 23-24. *Compare Turner*, 512 U.S. at 653-57 (concluding the cable must-carry rules do not unconstitutionally compel speech).

<sup>80</sup> *See id.*, 512 U.S. at 642, 662 (stating that intermediate scrutiny is the constitutional standard applicable to content-neutral provisions such as the cable must-carry rules).

<sup>81</sup> *See id.*, 512 U.S. at 662-64 (stating that intermediate scrutiny requires the provisions to further an important or substantial governmental interest unrelated to suppression of free expression, and finding that the cable must-carry rules further such an interest).

<sup>82</sup> *See id.*, 512 U.S. at 662 (stating that under the intermediate scrutiny applicable to content-neutral provisions, the incidental restriction on speech must be no greater than is essential to further the substantial governmental interest, and that the provision need not be the least restrictive means but an efficient one).



## VIII. Conclusion

Without the establishment of a technologically neutral, national policy of nondiscrimination, the ITV market will be dominated by vertically integrated broadband services providers that will restrict consumer choice and favor affiliated content and services. The Commission must not allow such dominant distributors to decide unilaterally whether there will be competition and consumer choice in the ITV market. The Non-MVPD Owned Programming Networks urge the Commission to issue an NPRM to ensure nondiscriminatory treatment of ITV services and content, thereby accelerating the deployment of advanced high-speed services to all Americans.

Respectfully Submitted,



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